No. 96-1822

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LAWRENCE R. ROSANO,

Petitioner,

—v.—

ADELPHI UNIVERSITY, JOSEPH CRAFA, NICHOLAS MANOBIANO, and VILLAGE OF GARDEN CITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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DECISION BELOW

The unpublished opinion of the United States Court of Appeals for the Second Circuit, dated November 25, 1996, which affirmed a jury verdict in favor of the defendant Nicholas Manobianco, and dismissal of the action as to defendants Adelphi University and Village of Garden City, is set forth in Appendix A of the Petition. Accordingly, defendant-respondent Village of Garden City respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the United States Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE

The only issue raised in the Petition as it relates to third party defendant-respondent Village of Garden City (also sued herein as the Garden City Police) (hereinafter collectively referred to as "Garden City") appears to be whether Garden City's attorney's question at trial was sufficiently prejudicial to warrant a new trial. To begin with, Petitioner's claim of prejudice was not preserved by Petitioner's trial counsel below. The so-called "prejudicial" question, in its restated form, was not objected to by counsel at the trial, nor was the handling of this matter by the Trial Court.

By way of background, this lawsuit, initiated more than ten years ago, involves Petitioner's claims arising from his arrests and subsequent conviction for criminal trespass for entering the Adelphi University campus in violation of the terms of a *persona non grata* letter that had been issued to plaintiff by Adelphi University. (Petitioner's Appendix A-4). Initially, the suit involved at least thirty defendants. Over the years, however, as a result of various orders and recommendations, only three defendants remained: defendants Adelphi University and Nicholas Manobianco and third-party defendant, Village of Garden City.

Indeed, by Memorandum and Order dated August 4, 1988, the Honorable Reena Raggi, substantially adopting a March 24, 1988 Report and Recommendation of Magistrate David F. Jordan (Respondents Adelphi and Manobianco's Appendix A (1a - 39a) and Appendix C (49a - 58a)), dismissed all claims against defendants Garden City, Adelphi University, Nicholas Manobianco and Dean Joseph Crafa, among others, but granted plaintiff leave to replead his claim for excessive force against Adelphi University and Mr. Manobianco. Plaintiff, alleging violations under 42 U.S.C. § 1983, claimed that defendant Nicholas Manobianco, then Chief of the Adelphi University security force, conspired with members of the Village of Garden City Police Department to use excessive force

upon the plaintiff when he was arrested for trespass at Adelphi. Garden City had subsequently been brought into the case by Adelphi University as a third-party defendant.

In December 1993, the case was tried to a jury. At the trial, petitioner's treating psychologist, Dr. D'Alessandro, was called by defendant-respondent Adelphi, without objection. It was elicited during cross-examination that Petitioner reported to Dr. D'Alessandro two unusual but similar type beatings. (Respondents Adelphi and Manobianco's Appendix F (67a)). During Garden City's attorney's cross-examination of Dr. D'Alessandro, she asked the witness the following question:

> Q. Did [Rosano] ever tell you that some time prior to that, that he had been assaulted by a correction officer in East Meadow, that he had been placed on the floor, and that his ankles had been put together, and that he had been jumped up and down on by correctional officers in East Meadow?

(Petitioner's Appendix A-30 - A-31). Plaintiff's counsel immediately objected, the question was not answered by the witness and a sidebar was conducted. (Petitioner's Appendix A-30 - A-31). The trial court struck the question, and without objection, allowed Garden City's trial counsel to address the issue in a rephrased question that would not reveal that petitioner had been incarcerated. Garden City's counsel rephrased the question as follows:

> Q. At any time during your course of treatment of Mr. Rosano, did he ever tell you that any police authorities other than Garden City or the Adelphi security forces had ever treated him in—had ever treated him in a manner such as he described to you as he had been treated by the Adelphi and Garden City police officers?

(Petitioner's Appendix A-32). This time, there was no objection by plaintiff's counsel. (Petitioner's Appendix A-32 - A-33).

Moreover, as Judge Amon states in her April 5, 1995 Memorandum and Order, the jury was instructed twice by the Court that the question was not evidence. (Petitioner's Appendix A-26). Judge Amon also instructed the jury, as part of the Court's charge, that "[a]ny evidence ordered stricken by the Court must be entirely disregarded by you in your deliberations." (Petitioner's Appendix A-26). In addition, the Court instructed the witness that in responding to counsel's question he should not indicate "the circumstances of where it happened. Just if you can tell us what he told you." (Petitioner's Appendix A-33). The witness followed the Court's instruction and did not refer to Petitioner's incarceration in his response. (Petitioner's Appendix A-33).

In her April 5, 1995 Memorandum and Order, Judge Amon also noted Garden City's counsel's explanation that her question was not intended to deliberately violate the Court's pretrial evidentiary ruling. Garden City's counsel explained that it was her understanding that the Court's ruling referred only to plaintiff's most recent incarceration and not to the incident to which she was referring, which occurred in February or March 1991. (Petitioner's Appendix A-27).

Finally, Judge Amon found that Garden City's counsel's "question in its restated form was not improper in that it did not make any reference to plaintiff's subsequent periods of incarceration." The Court opined:

> The inquiry was also relevant. Plaintiff had described a very unusual form of abuse [footnote: Plaintiff testified that while he was pinned to the ground, the security guards put his ankles together and began 'jumping on [him] like a trampoline.'] and it was relevant to his credibility that he had made an accusation of the same unusual conduct against a different group of police.

(Petitioner's Appendix A-27 - A-28).

Prior to the case having been given to the jury, the trial court dismissed plaintiff's claims against defendants Adelphi

University and Garden City. (Petitioner's Appendix A-4 - A-5). On December 16, 1993, the jury returned a verdict in favor of the only remaining defendant, Nicholas Manobianco. (Petitioner's Appendix A-5).

By Memorandum and Order dated June 28, 1994, Judge Amon denied plaintiff's claim for a new trial pursuant to Rule 59 (a)(1) on various grounds. (Petitioner's Appendix A-16 - A-21). Judge Amon's April 5, 1995 Memorandum and Order, dealt with plaintiff's only remaining claim for post-trial relief, namely, that a question posed by Garden City's trial attorney violated an instruction by the trial court and was sufficiently prejudicial to warrant a new trial. Judge Amon concluded that Garden City's attorney's question did not warrant a new trial. (Petitioner's Appendix A-22 - A-29).

The judgment of the United States District Court for the Eastern District of New York and the denial of petitioner's Rule 59 motions were affirmed by the United States Court of Appeals for the Second Circuit. (Petitioner's Appendix A-1 - A-6).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

POINT I

GARDEN CITY'S ATTORNEY'S QUESTION WAS NOT SUFFICIENTLY PREJUDICIAL TO WARRANT A NEW TRIAL

The case law is clear, and this Court has held, that a new trial will not be granted unless the Court " 'is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice.' " *Sorlucco v. New York City Police Dept.*, 971 F.2d 864, 875 (2d Cir. 1992) (quoting *Smith v. Lightning Bolt Productions, Inc.*, 861 F.2d 363, 370 (2d Cir. 1988)).

This Court's observation in *Smith v. Lightning Bolt Productions, Inc.*, with respect to an improper question posed by plaintiff's counsel, is instructive:

> Plainly this question was improper, but the Court acted promptly to minimize any damage from it. It immediately struck the question, even before defense counsel could voice an objection, and it cautioned the jury to disregard the question. There was no further mention of the subject within the hearing of the jury. The trial judge was in the best position to assess the effect of the matter on the jury, and we can see no basis for overturning his view that this limited breach did not warrant a new trial.

Smith v. Lightning Bolt Productions, Inc., 861 F.2d at 370.

Similarly, in the instant case, upon the question having been objected to by plaintiff's counsel, after a sidebar, the question was stricken by Judge Amon. (Petitioner's Appendix A-30 - A-31). Further, Garden City's counsel was instructed to rephrase the question in a way that would not reveal that plaintiff had been incarcerated. (Petitioner's Appendix A-32). Moreover, the witness was instructed to limit his answer to what he was told, and the jury was instructed twice by the Court that the question was not evidence. (Petitioner's Appendix A-26 & A-33). Judge Amon also charged the jury that "[a]ny evidence ordered stricken by the Court must be entirely disregarded by you in your deliberations." (Petitioner's Appendix A-26).

Clearly, the Court took all the necessary precautions to protect plaintiff from any prejudice that may conceivably have resulted from counsel's question. Hence, as Judge Amon concluded in her April 5, 1995 Memorandum and Order, "the initial question posed by counsel for Garden City does not rise to the level of prejudice necessary to justify the granting of a new trial." (Petitioner's Appendix A-26).

Moreover, Judge Amon found that counsel's question in its restated form was not improper "in that it did not make any reference to plaintiff's subsequent periods of incarceration" and "[t]he inquiry was also relevant," since plaintiff had described a very unusual form of abuse "and it was relevant to his credibility that he had made an accusation of the same unusual conduct against a different group of police." (Petitioner's Appendix A-27 - A-28).

Furthermore, plaintiff's counsel did not object to Garden City's counsel's question in its restated form. (Petitioner's Appendix A-32 - A-33). As Judge Amon observed in her April 5, 1995 Memorandum and Order, "[a]bsent plain error, a party's failure to object to the admission of evidence at trial precludes the party from raising the argument on appeal." (citing Fed. R. Evid. 103; *Hutchinson v. Groskin*, 927 F.2d 722, 725 (2d Cir. 1991)). (Petitioner's Appendix A-28).

Indeed, in light of the foregoing, the Court of Appeals for the Second Circuit aptly concluded that "[a]lthough an improper question was asked, the district court minimized the prejudicial effect of the question by immediately ordering the question struck from the record. Thus, the challenged statement does not provide a basis for disturbing the jury verdict." (citing *Smith v. Lightening Bolt Prod., Inc.*, 861 F.2d 363, 370 (2d Cir. 1988)). (Petitioner's Appendix A-5).

Petitioner's claim that these questions by some stretch of the imagination "planted" an "idea . . . in the mind of the jury that the Petitioner was incarcerated and had made prior claims - litigiousness" is belied by the Record herein. There was no evidence that Petitioner had a non-felony criminal record, or a criminal record of any sort, or that he had made prior claims, as Petitioner contends. The fact that Petitioner told his treating psychologists that he was subjected to the same unusual conduct on another occasion merely goes to the issue of credibility. Petitioner's attempt to create prejudice where none exists, particularly where the trial court went to great

lengths to minimize the effect of the initial question, and where Petitioner's counsel did not object to the question in its restated form, simply must fail. Hence, Petitioner's writ of certiorari should be denied.

CONCLUSION

In light of the foregoing, it is clear that there was no error at trial, no prejudice to Petitioner sufficient to warrant a new trial and no properly preserved basis for Petitioner's claim herein. Petitioner has had the benefit of a full jury trial and numerous motions in this matter, while having been represented by two competent attorneys. Hence, defendant-respondent Village of Garden City, respectfully requests that this Court deny Petitioner's writ of certiorari and affirm the judgment of the Court of Appeals for the Second Circuit together with such other and further relief as this Court deems just and proper.

Dated: Valley Stream, New York
June 26, 1997

Respectfully submitted,

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